

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE CHARLES R. BREYER, JUDGE

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IN RE: TRANSPACIFIC PASSENGER)
AIR TRANSPORTATION)
ANTITRUST LITIGATION.)

) C 07-5634 (CRB)
) No. MDL-1913
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THIS DOCUMENT RELATES TO ALL)
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TRANSCRIPT OF PROCEEDINGS

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1 (Tuesday, November 2, 2010)

2 (9:35 a.m.)

3 (In open court)

4 DEPUTY CLERK: Calling case MDL 1913, Case C 07-5634,
5 In re: Transpacific Passenger Air Transportation Antitrust
6 Litigation.

7 Appearances, Counsel?

8 MR. WILLIAMS: Good morning, your Honor. Steve
9 Williams, Joseph Cotchett, Cotchett, Pitre & McCarthy, for the
10 plaintiff class.

11 MR. BAKER: Phillip Baker, for the plaintiffs.

12 MR. LEHMANN: Michael Lehmann and Christopher Lebsock,
13 Hausfeld LLP on behalf of the class.

14 MR. SHERMAN: Good morning, your Honor. William
15 Sherman, Latham & Watkins, for Singapore.

16 MR. WARNOT: James Robert Warnot, Linklaters, for
17 Air France.

18 THE COURT: Good morning.

19 MR. MacDONALD: Gary MacDonald, KLM Royal Dutch
20 Airlines.

21 MR. HAWK: Robert Hawk, Hogan, Lovells, for defendant
22 Vietnam Airlines.

23 THE COURT: Good morning.

24 MR. ROSENTHAL: Good morning, your Honor. Douglas
25 Rosenthal, Constantine, Cannon, for ANA.

1 THE COURT: Good morning. So let's start where -- oh,
2 sorry, Mr. Cotchett. Good morning.

3 MR. COTCHETT: Good morning, your Honor, and may I
4 have one second?

5 THE COURT: Sure.

6 MR. COTCHETT: On Friday we filed, as you heard
7 yesterday and asked that you take judicial notice of, the ANA
8 press release. While we were in court yesterday, the Justice
9 Department issued their press release. And their press
10 release -- I'm going to hand it up to your Honor and counsel --
11 is a little different than the ANA press release. With your
12 permission, may I hand it up?

13 THE COURT: Sure.

14 MR. COTCHETT: You will note there was a lot of
15 colloquy yesterday, discussion by counsel, about what is the
16 Filed-Rate Doctrine what does it include, what is this, what is
17 that, how do you really do it. Do you publish, do you not
18 publish. Well, this makes it very clear what they pled guilty
19 to. They pled guilty to fixing unpublished passenger fares on
20 tickets purchased in the United States. Just -- I don't want
21 to argue it, but nowhere in their press release do they talk
22 about unpublished. In fact, ANA authored unpublished passenger
23 fares to travel agents purchased in the United States. That
24 also goes to the issue of the domestic effects desk. We will
25 file with the Court the actual indictment and plea.

1 THE COURT: Thank you. Mr. Sherman?

2 MR. SHERMAN: Your Honor, just briefly, we obviously
3 don't object to the Court receiving information about the ANA
4 plea. As we pointed out in our response to plaintiff's
5 submission on Friday, we don't think that press releases are
6 the best way for the Court to get that information. It's
7 through the actual Plea Agreement and/or the Information.

8 I note as well that the plaintiffs have highlighted
9 portions of this press release. There are certainly many
10 things we could say about the ANA plea, and perhaps ANA's
11 counsel will say that. My point is simply that, to the extent
12 that the Court needs this information as the case goes
13 forward -- and we don't think that the information is relevant
14 to the motions at hand --

15 THE COURT: Well, it might be. Let me ask this
16 question: The charging document, do I have a copy of the
17 charging document, the document to which they pled guilty?

18 MR. COTCHETT: We will have that this afternoon.
19 That's just coming out. That's following this announcement.

20 THE COURT: Okay. Because it says that they've agreed
21 to plead guilty. My question is: Have they pled guilty?

22 MR. SHERMAN: I'm going to have to let --

23 MR. COTCHETT: We agree with counsel that look, this
24 is only a press release. We'll get you the actual --

25 THE COURT: But maybe the event hasn't happened yet.

1 That's what I'm -- not that it won't happen over some -- in
2 some short order. But the documents that I think I would look
3 at would be the plea agreement, the charging document, and I'm
4 not sure that I wouldn't look at a statement that a defendant
5 releases in a press release, because it appears to me in some
6 manner it might be an admission. If the defendant said, Look,
7 I did this, or, I did that, in a press release, in addition to
8 what they say when they enter a plea, I don't know why I
9 wouldn't take notice of that. What the government says, I'm
10 not quite sure that that's in the same category.

11 MR. COTCHETT: The bottom line is -- I thought I made
12 it clear -- I just wanted to alert the Court to this, and we
13 will get you the actual charging and plea agreement.

14 THE COURT: Okay. Thank you.

15 MR. COTCHETT: Thank you.

16 MR. ROSENTHAL: Since I will be speaking --

17 THE COURT: Do you want to come up so the court
18 reporter can hear you?

19 MR. ROSENTHAL: Douglas Rosenthal for ANA. Since I
20 will be speaking shortly for ANA on a motion, I might address
21 our view of what the plea was for -- in fact, I'm prepared to
22 read to the Court -- we don't have a signed plea agreement
23 ourselves -- but I'm prepared to read to the Court what we have
24 agreed to with the Justice Department.

25 THE COURT: Isn't it better that I take a look -- I

1 mean, I'm not deciding the motion today. Isn't it better that
2 I simply get the documents when they are filed, and they speak
3 for themselves?

4 MR. ROSENTHAL: It may be a month before the plea
5 agreement is released.

6 THE COURT: Well, I'm patient.

7 MR. ROSENTHAL: Pardon?

8 THE COURT: I'm patient. I have waited 53 years for
9 the Giants to win a World Series. I can wait a month.

10 (General laughter)

11 MR. ROSENTHAL: Absolutely.

12 MR. WARNOT: James Warnot of Linklaters, and I
13 represent Air France. And I'm speaking, as you will recall, on
14 behalf of the five European airlines who fly to the United
15 States across the Atlantic ocean, rather than the Pacific
16 ocean, which is the subject matter of this case.

17 Unless you'd like me to, I'm not going to start over
18 again.

19 THE COURT: Yes.

20 MR. WARNOT: But let me briefly recap in that, you
21 know, this is the third one of these cases for us. The other
22 two cases had very similar allegations, but they pertain to
23 markets in which we actually did participate. And so from our
24 perspective it would be quite ironic if we were to remain in
25 the case in the market where we don't participate.

1 But in any event, what I explained to you yesterday is
2 that the complaint does not sufficiently allege that we are in
3 the market and therefore is unsustainable. It does not
4 sufficiently allege that we service the class as defined in the
5 complaint.

6 Plaintiffs made some efforts to rectify that in their
7 opposing papers. And what they did is went out and tried to
8 search for whatever they could find that they could throw up
9 and see if it might stick. And I need to address each of the
10 five airlines separately, and I'll do that very briefly.

11 With respect to Scandinavian and Swiss, they say
12 nothing whatsoever. So presumably they are conceding that
13 those airlines do not in any way, shape or form service this
14 market.

15 With respect to KLM, they put in a webshot purporting
16 to show a flight from San Francisco to Seoul, South Korea, but
17 what they didn't reveal to the Court is the way you get there,
18 which is in the next page of that screenshot, which we have
19 attached in our request for judicial admission, which shows
20 that the way you get there is you fly from San Francisco back
21 to Amsterdam, switch planes, go from Amsterdam to Seoul, and
22 get there two days later without crossing the Pacific Ocean,
23 and therefore still don't service the class in this case.

24 With respect to Air France, they have dredged up this
25 flight to a piece of France which still exists out in the South

1 Pacific Ocean called Tahiti -- Papeete, to be precise. As an
2 initial matter, we question whether that's even a trans-Pacific
3 flight, given that Tahiti is actually east of Hawaii, and I
4 don't see that anyone is suggesting that Hawaii is -- flights
5 to Hawaii are part of this class. Check it out. It is a fact.

6 THE COURT: East of Hawaii?

7 MR. WARNOT: Certainly is, by 15 degrees of longitude.

8 THE COURT: That's like the old thing that Reno is
9 west of Los Angeles.

10 MR. WARNOT: I just heard that yesterday.

11 (General laughter)

12 MR. WARNOT: But in fact, it is. It's nowhere near
13 the rest of the destinations that are purported to be part of
14 this case.

15 But perhaps more importantly, there is not a single
16 allegation anywhere in this complaint that has anything to do
17 with that single route that Air France services. Even if you
18 assume for a minute that a flight to Tahiti is a trans-Pacific
19 flight, which we do not by any means concede.

20 And then, also importantly, no other coconspirator,
21 named or unnamed, or -- as a defendant, services that route as
22 well. So there would be no occasion for us, with respect to
23 that route, to conspire with anybody about anything.

24 Then the fifth airline is Lufthansa, and plaintiffs
25 have cited a couple of code shares, and as an initial matter,

1 it's our position that a code share is nothing more than an
2 opportunity to conspire and is not evidence of a conspiracy,
3 but perhaps more importantly, with respect to the two code
4 shares that I've identified, Lufthansa has put in some
5 materials from DOT records which are properly noticeable on
6 this motion which demonstrates that as to those flights,
7 they're really just a mechanism for Lufthansa to fill out its
8 global network. So if they have people who want to go from
9 Frankfort to Auckland, via the states, they can switch to an
10 Air New Zealand plane in LAX, I think it is, but new passengers
11 don't get on the plane there, and the DOT records make that
12 clear.

13 Same thing is true with respect to a United flight
14 from San Francisco to Sydney, I believe it is. So they haven't
15 demonstrated that we fly those routes.

16 What else do they say? Well, it's a global conspiracy
17 and you guys were doing something out in Asia and therefore you
18 should be put into this case.

19 As an initial matter, I think if you read the
20 complaint carefully, while that might be one inference that
21 could be drawn, it's not a reasonable one and they certainly
22 don't allege it. And they've come back in their opposing
23 papers, the thing they point to as an allegation of a global
24 conspiracy is in Paragraph 90 of the complaint, and that is a
25 quote from a DOT press release. Doesn't say anything about the

1 global conspiracy.

2 But more importantly, what we say about that is, it's
3 really just an attempt to get around the fact that we are not a
4 competitor in the trans-Pacific market. And if we're not a
5 competitor in the market in question in this case, there's no
6 liability.

7 Now, on top of that, this mantra of global conspiracy
8 has been raised in the FTAIA context as well. This Enterprise
9 case is a key example. That's what the plaintiff was trying to
10 allege to keep the defendants in the case for what was purely
11 foreign conduct. And with respect to us, all our conduct out
12 in Asia is going back to Asia. None of it's going from Asia to
13 the U.S.

14 So to the extent that they are trying to distinguish
15 *LaFlamme*, for example, in the way they did yesterday by saying,
16 Well, we have all these e-mails about B.A.R. meetings in Hong
17 Kong and B.A.R. meetings in Bangkok and B.A.R. meetings in
18 wherever else -- to the extent that we are mentioned at all, it
19 is not with respect to conduct affecting the United States.
20 It's alleged conduct affecting our flights back to Europe.
21 There could be no way it's with respect to our flights to the
22 United States because we don't have any from Asia.

23 They also try to point to other investigations. You
24 know the basic rule: Judge Alsup's decision in *Graphics*
25 *Processing* and some of the other cases we've cited, is that

1 other investigations are really not relevant to allegations.
2 When I say other investigations, I mean other conduct. They
3 come back citing a number of cases, but all the cases they
4 cite, the investigation is with respect to the precise conduct
5 alleged in the complaint. That's not the case here. As I said
6 when I started yesterday, as far as we're concerned, for the
7 European carriers, these cases are an attempt to bootstrap
8 problems that we had in our cargo business.

9 With that, I want to briefly turn to the FTAIA and, as
10 Mr. Sherman mentioned yesterday, we're not just going to repeat
11 the argument that was made yesterday, and the reason for that
12 is it's a completely different argument. We don't have to talk
13 about whether or not our flights are import commerce, because
14 our only flights that emanate and terminate in Asia are flights
15 from Europe. So it's purely foreign commerce. You don't cross
16 the borders of the U.S. in any respect. As a result, there's
17 no subject matter jurisdiction. In that regard, this case is
18 much like the *McLafferty* case that Judge Pollack decided in
19 Philadelphia in which the commerce at issue was flights between
20 Europe and Japan. This, I suppose, could be arguably expanded
21 if you've got other destinations to which we fly, and I can't
22 speak for all the European airlines, but Air France, for
23 example, it goes to Hong Kong, it goes to Bangkok, it goes to
24 Singapore, it goes to Tokyo, etc. from Charles de Gaulle in
25 France. Not from the U.S.

1 So, as I said, our arguments totally different, but in
2 response what plaintiffs had done is basically take their
3 response to the omnibus motion and cut and paste it into our
4 brief. That argument is irrelevant to the point we're making.
5 The point we're making is a very simple and very clear one:
6 It's not our market. That's why we don't belong there.

7 Unless you have any questions, I'll sit down and
8 reserve a few minutes.

9 THE COURT: Thank you.

10 MR. LEHMANN: Your Honor, Michael Lehmann, appearing
11 on behalf of the plaintiffs.

12 Let's first talk about Air France. In Exhibit B to
13 the reply declaration of Thomas McGrath put in by the
14 defendants, it is confirmed that Air France flies directly
15 between Los Angeles and Papeete. What they don't mention is
16 that the same declaration indicates that Air New Zealand also
17 flies to Los Angeles, Papeete, Auckland route. Now, they say
18 these aren't trans-Pacific routes. But consider what happened
19 at the time of the AR meeting. There the various airlines
20 agreed to impose surcharges across the world on air passenger
21 service with respect to fuel: \$2 for domestic flights, \$7.00
22 for regional flights, \$15 for intercontinental flights. That
23 agreement covered flights to Europe, flights to the
24 trans-Pacific, flights to Auckland, flights to Papeete. It was
25 a global agreement reached there. So we think the conspiracy

1 that is alleged in the consolidated amended complaint does
2 reach this conduct.

3 Now, we've also alleged that various European
4 characters are in alliance with trans-Pacific carriers and have
5 code sharing agreements with such carriers. Lufthansa and
6 S.A.S. are part of the Star Alliance. Air France and KLM,
7 Faster Sky Team. Air France has code sharing arrangements with
8 Northwest Qantas -- that is JAL. Lufthansa with Swiss
9 International. And, according to the McGrath declaration, Air
10 New Zealand. KLA, JAL. Northwest, Qantas and Malakes Air.
11 Swiss International as well, Lufthansa, Thai Air and UAL.

12 And I think the DOT reported that have been put before
13 you that show for example a Lufthansa flight originating in
14 Munich and ending in Los Angeles don't quite tell the whole
15 story. Because you can't tell from those records whether the
16 flight is part of a multi-leg flight where there's a code
17 sharing agreement with an Asian carrier. And the code sharing
18 agreements are important because what we allege is that the
19 agreement here was to impose these surcharges and fares
20 throughout each leg of the flight. So when you're buying that
21 ticket in Munich and you want to go to Tokyo, you might fly to
22 Los Angeles and then catch a connecting JAL flight to Tokyo.
23 But the European carrier is charging the surcharge along the
24 entire route.

25 Even if you assume that S.A.S., Swiss International,

1 KLM and these others never flew their own planes or even code
2 shared with others on flights across the Pacific, they're still
3 properly named defendants in the CAC. Certainly purchases of
4 tickets in the U.S., and these European carriers do fly flights
5 that land in the U.S., are not subject to an FTAIA analysis.

6 And, as we've alleged at length in the complaint, the
7 European carriers were present at these Asian meetings before
8 the imposition of fuel surcharges and fares were the subject of
9 discussion and agreement, and in terms of the FTAIA analysis, I
10 would cite your Honor to Carpet Group International vs.
11 Oriental Rug Importers, cited in our brief. They're a
12 defendant trade association that did not import any goods into
13 the United States, was nonetheless held to be a proper
14 defendant despite the FTAIA, for conspiring with others who
15 directly did import.

16 I'd like to talk a little bit about what the evidence
17 is with respect to the European careers and these Asian trade
18 associations. Lufthansa, S.A.S., Air France, KLM and Swiss
19 International were recipients of e-mails concerning the
20 imposition of consensual fueling charges and participated in
21 meetings on May 18th, 2004 and September 1st, 2005, the Thai
22 B.A.R., where those surcharges were set. Among the
23 participants were Wolfgang Schmidt, Lufthansa, Axel Blom, SAA,
24 Smartchai Tuchinda, Lufthansa, Axel Blom, Ihab Sorial, KLM --
25 they all attended the 2004 meeting.

1 Wolfgang Schmidt, a woman named Christine Seuge, on
2 behalf of Air France, and Brian Sinclair-Thompson, from Swiss
3 International, attended the 2005 meeting.

4 At that latter meeting, the attendees were urged to
5 form a subgroup that would examine base fares and discuss each
6 others fares.

7 European carriers also collectively agreed to fix fuel
8 surcharges with members of the Philippine B.A.R. An e-mail by
9 Joanne Sotocinal of Philippine Airlines dated May 25th, 2004
10 was sent to representatives of, among others, Air France,
11 mlreyes and Mr. Lovergeon, KLN, Jose Laurente, SSA, Nila Layug,
12 and Swiss International, Paul Schenk, asking for confirmation
13 of the agreement as to the fuel surcharge decided upon in the
14 May 21st meeting of the Philippine B.A.R.

15 The CAC notes that various carriers, including Swiss
16 International, concurred.

17 Swiss International is all part of the -- also part of
18 the Hong Kong B.A.R. Members of that B.A.R. agreed to
19 coordinate, if you will, surcharge pricing through the
20 organization's airline charges subcommittee.

21 Over and above these BAR's, we have e-mail traffic
22 with European carriers that demonstrate their involvement. For
23 example, an e-mail dated October 29th, 2004 from JAL confirmed
24 Air France's plans for a 10 Euro fuel surcharge on
25 international flights. Another e-mail confirms that Lufthansa

1 had increased fuel surcharges on international flights by the
2 exact same amount. Another e-mail sent in November of 2004
3 illustrate the efforts by JAL to coordinate fuel surcharges
4 with various carriers including Air France, KLM and Lufthansa.
5 An e-mail dated August 18th from Thai airline -- 2005, from
6 Thai Airways -- Carol Faxtufos represented several carriers
7 including S.A.S., Lufthansa, and Swiss International --
8 documents Thai Airways plans for air passenger fuel surcharges,
9 asked that these carriers, quote, "Toe the line with us",
10 unquote. And informs the recipients that, quote, "We are
11 asking for unity and to be on board with the fuel surcharge."

12 Your Honor, I think there's a question. If the
13 European carriers have no trans-Pacific flights, and weren't
14 involved in this matter, why were they agreeing to these
15 surcharges at the various Asian BAR's? I think an answer is
16 provided in the consolidated amended complaint. We've quoted a
17 finding of the United States Department of Transportation which
18 a participating airline will at times urge competing airlines
19 to raise fares in their market in order to avoid undercutting
20 the fares charged to the airlines own principal markets.

21 And your Honor, this is not just theoretical. We've
22 alleged more in the complaint. For example, we allege a JAL
23 e-mail from November of 2004 in which it said it would, quote,
24 "help its competitors implement fuel surcharges in Japan and
25 would then follow the lead of those competitors in their home

1 markets," unquote.

2 This is in the context of previous negotiations on
3 surcharges that JAL had with Air France, KLM and Lufthansa.

4 A Singapore e-mail, Air, e-mail also quoted in the
5 complaint said, "Even if a carrier would not be able to
6 increase the fares from their country, it would benefit from
7 fair increases adopted in other countries.

8 And the minutes of the May 18th 2004 Thai B.A.R.
9 meeting make clear that there was, quote, "stress the
10 importance of having unity among airlines when imposing
11 surcharges for both cargo and passengers." That document is
12 found at Exhibit A to the declaration of Charles Price put in
13 by defendants.

14 Now, we also talked about the various investigations
15 of Air Cargo, and there is a leniency request from Lufthansa;
16 guilty pleas from S.A.S. Air France and KLM. This is a related
17 industry. The Thai B.A.R. minutes from May 2, 2004 reflect
18 that the two were discussed at the same time. And cases like
19 SRAM and Flash Memory in this district say it is proper to look
20 at guilty pleas and investigations in related industries.

21 Let's talk about some of these cases that the
22 defendants have cited. The *McLafferty vs. Deutsche Lufthansa*
23 case where the plaintiff alleged he purchased a ticket whose
24 price was fixed in the United States for travel solely between
25 Europe and Japan. No portion of the flight touched down in the

1 United States. That's not this case.

2 Centerprize, a British company, sues in the U.S. under
3 U.S. antitrust laws for purchases it made abroad. No contact
4 in the United States other than the choice of forum. We think
5 that's entirely different.

6 In the KAL case, also which we discussed a little
7 yesterday, we also pointed out that they're a domestic effects
8 exception. Dismissal motion was denied on June 25th, 2008 on
9 the grounds that plaintiffs had plausibly alleged restraint on
10 a U.S./Korea route. The court allowed over two years of
11 discovery and then when the motion came up again it did grant
12 the motion to dismiss on the basis of the fact that the
13 defendant's expert had done an insufficient analysis.

14 We think, as in Air Cargo Shipping Services, the
15 relevant issue here is that Air Cargo Services -- and we think
16 this is true for cargo as well as transportation, that are
17 provided are not rendered in one location, rather than they are
18 performed along the entire transportation route, touching both
19 the country of origin and the country of destination. And we
20 think in a multi-leg flight, it touches the country of origin
21 and each country of destination.

22 So we think that on FTAIA issue, there are questions
23 here that are raised by the complaint that entitle us to go
24 forward. We've pled a plausible conspiracy.

25 And I think the point that if I will leave your Honor

1 with is to look at what Judge Illston in the TFT-LCD matter,
2 the issue of FTAIA came up in the context of class version as a
3 defense of certification because it mentioned individual
4 issues, and what Judge Illston held was that the FTAIA defense
5 would be resolved on a common basis, and the determination of
6 whether the defendants import goods, whether defendants conduct
7 is foreign and outside the scope of the Sherman Act, and if
8 foreign conduct is involved, whether the foreign conduct
9 sufficiently affects domestic commerce, were all issues that
10 would be decided on a full and evidentiary record, and we think
11 that is the principal that ought to be applied here.

12 Judge Illston's opinions on that can be found at
13 267 F.R.D. 291, at 307 to -08; and 267 F.R.D. 583 at 599.

14 Thank you, your Honor.

15 MR. WARNOT: Just a couple of points additionally.
16 The initial point I would make, I still did not hear plaintiffs
17 assert, We fly trans-Pacific routes, because they can't. What
18 I have heard them assert is supposition that, Why would we be
19 attending a Thai B.A.R. meeting, for example, if we didn't fly
20 those routes? That's very simple, because we fly between
21 Europe and Thailand.

22 And I would also note on that particular B.A.R.
23 meeting in the complaint it indicates that it was agreed that
24 B.A.R. should come up with a proposal, ellipses, "... with a
25 target implementation date of 1st June, 2004." What's in the

1 ellipses, but not in the complaint, is "and submit it to the
2 department of Civil Aviation," i.e., for approval, i.e.,
3 petitioning the government and therefore for Pennington.

4 That's the first point I would make.

5 Secondly, he argued that purchases of tickets in the
6 U.S. are not subject to the FTAIA argument. Well, any
7 purchases of tickets in the U.S. for flights that we had
8 between Europe and Asia are very much subject to that argument.
9 That's *McLafferty*. That was the precise situation that
10 occurred in *McLafferty* in which Judge Pollack threw the claim
11 out. So in fact, *McLafferty* is this case.

12 We don't have to revisit the whole FTAIA argument that
13 Mr. Sherman made yesterday -- my colleague began to go down
14 that road -- because there are no U.S. effects at all for us.
15 The question, or the -- what plaintiffs are asking the Court to
16 do is basically exercise jurisdiction over alleged conduct that
17 may have occurred in Asia with respect to purely foreign
18 commerce. That's the job of courts in other countries, as the
19 Supreme Court held in *Amergram*.

20 Thank you.

21 THE COURT: Thank you. I'd like to hear argument on
22 the -- on the regulatory scheme in Japan.

23 MR. ROSENTHAL: Your Honor, Douglas Rosenthal for ANA.
24 I make this motion on behalf as well of Thai Airways and China
25 Airlines. And the argument is based on the very distinctive

1 regulatory structure in Japan. All defendants fly under
2 bilateral air service agreements, but the U.S./Japan treaty was
3 unique. It's a very mature treaty. It was signed two years
4 before the Giants last won the World Series. It was made while
5 the U.S. and Japan were still at war. We were occupying Japan
6 without a peace treaty. So the U.S. had disproportionate
7 influence in the drafting of that treaty. The U.S. decided
8 that it would benefit U.S. strategic and trading interests to
9 have Japan give it and several U.S. airlines gateway rights to
10 Asia to fly from Japan throughout Asia out of Tokyo. Japan, a
11 defeated, occupied country, reluctantly agreed, but it said
12 there would be a price for its agreement. The price which
13 continues and has greatly expanded today was Japan's insistence
14 that it control market access and pricing to help Japanese
15 carriers become established and to be able to survive against
16 American competition. Japan, through its transport ministry,
17 insisted on comprehensive Japanese anticompetitive regulation.
18 And insisted that it extend even into U.S. markets to regulate
19 fares exiting the United States to Japan.

20 In the 1952 treaty, and in official policy meetings
21 thereafter --

22 THE COURT: Let's assume that I accept all that --
23 I've read your brief. Let's assume I accept all that. Tell me
24 the so-what, the legal so-what, to it all?

25 MR. ROSENTHAL: The legal so-what is the treaty

1 preempts the Sherman Act applying in U.S./Japan aviation. And
2 it preempts because it -- it preempts really for two reasons.
3 But it preempts because it says that it is displacing
4 competition. It was adopted by the Congress in 1958, which is
5 68 years after the Sherman Act, and therefore it carves out an
6 exception for this arrangement.

7 Now, to cut right to the heart of it --

8 THE COURT: Has any court held that?

9 MR. ROSENTHAL: No. And this issue has never been
10 raised before. No court has denied it either. This is a case
11 of first impression.

12 THE COURT: Well, we don't know whether that's
13 correct. Maybe. Maybe.

14 MR. ROSENTHAL: I think we would know if it was
15 correct. I'm quite sure that this has not been challenged
16 before, and one reason it's not been challenged before is that
17 the Justice Department has never sought to enforce U.S.
18 antitrust law before -- against a Japanese airline in this
19 situation.

20 And what I would emphasize to your Honor as
21 particularly telling --

22 THE COURT: You say that the treaty itself --
23 itself -- implies --

24 MR. ROSENTHAL: And the implementing regulations by
25 both governments.

1 THE COURT: So you think it would probably be a good
2 idea that I ask the State Department whether that's their
3 interpretation of the treaty? And -- because you think that it
4 will be consistent with your view?

5 MR. ROSENTHAL: I'd be delighted for you to ask the
6 State Department, but we've also submitted materials which
7 include materials from the Department of Transportation and the
8 State Department at -- in 1998, the one time that this treaty
9 was amended, and this really I think goes to the heart of why
10 there is preemption.

11 In that 1998 treaty, the language was inserted for the
12 first time -- this was a treaty amendment -- it was an
13 amendment which gave the United States more rights than it had
14 had before, but it also reaffirmed the lack of price
15 competition.

16 And this is what the amendment says: "Nothing in this
17 memorandum of understanding" -- which is the treaty amendment
18 -- "shall be construed to limit the rights of either party to
19 enforce its domestic competition laws against any airline
20 operating services under this 1998 MOU." So, long as such laws
21 and regulations do not discriminate on the basis of nationality
22 or any other improper or inappropriate basis.

23 Now, we disagree with the plaintiff as to how you read
24 that language. But let's assume that the plaintiff's reading
25 is correct, and U.S. domestic antitrust law applies. That

1 means that defenses under U.S. antitrust laws also applies.

2 THE COURT: They've agreed to that.

3 MR. ROSENTHAL: No, they don't.

4 THE COURT: They don't?

5 MR. ROSENTHAL: They argue that *Southern Motor*
6 *Carriers* and *Credit Suisse*, both strong Supreme Court
7 decisions, that they shouldn't be applied to a foreign country.
8 They say they're only applicable within our federal system.

9 But the treaty itself, your Honor, says it has to be
10 applied in the Japanese regulatory context as well. And here
11 you have under *Southern Motor Carriers* clearly articulated
12 policy -- the evidence of that is overwhelming. And active
13 supervision.

14 And to focus your Honor, I have two documents which we
15 submitted which we believe are entitled to judicial notice
16 which do show the review process in Japan from the filing of
17 the application up through its seal of approval by the Japanese
18 ministry to raise fares. These documents also show, because
19 both of them relate to fuel surcharges, that approval had to be
20 obtained from the carriers of -- in competition with the
21 Japanese carriers, in 14 other Asian nations under the
22 Bilateral Air Services Agreements Japan had with these 14 other
23 nations.

24 Questions were raised yesterday about the Filed-Rate
25 Doctrine. Well, did anybody pay any attention to it? Did

1 anybody do anything in the regulatory agency? You will see
2 here that there is a seal and signature from the Japanese
3 Ministry of Transport in both of these documents
4 affirmatively --

5 THE COURT: So these documents -- it's your view that
6 these documents confirm your argument that the Japanese
7 ministry, with respect to tariffs, to setting prices, is
8 vigorous in their supervisory capacity or their -- whatever
9 capacity they have, reviewing them and then accepting them?

10 MR. ROSENTHAL: Yes.

11 THE COURT: And it's more complicated than that
12 because they actually have to go after all these other
13 entities, countries or other carriers and so forth, and I don't
14 know, did they solicit their views? Or did they simply try
15 achieve an agreement? Or what?

16 MR. ROSENTHAL: It's more interesting than that, your
17 Honor. They asked the two Japanese flag carriers, JAL and ANA,
18 to go out and talk to Thai Airways and Air Canada and the other
19 airlines in these other bilateral treaties, and they asked them
20 to get their assent and the assent of their governments to an
21 agreed fuel surcharge increase, and if they don't get it, the
22 Japanese government refuses to give them the fuel surcharge
23 that they're seeking.

24 THE COURT: Do they have -- we have evidence of that?

25 MR. ROSENTHAL: Yes. You have it in I think what's

1 been submitted to you, but also is reflected in those
2 documents.

3 So I guess the point I'm making, I'm focusing on, is
4 that, you know, in *Southern Motor Carriers* you have to have the
5 two prongs of the Mid-Cal test, the clear policy. Well, the
6 policy is extremely clear, as we set out in our briefs, and the
7 active supervision -- and these documents show the active
8 supervision.

9 We've also submitted transcripts of press conferences
10 and meetings between the United States diplomatic officials in
11 the transportation department and from the State Department in
12 which they review the operation of this treaty, and in which
13 they concede that this treaty does not provide price
14 competition in this market.

15 Furthermore, as we heard yesterday, because the
16 Department of Transportation is very aware that it is not a
17 competitive market in Japan, the Department of Transportation
18 until late in 2008 classified Japan as a Category C country
19 where there wasn't market access and sufficient competition.
20 So the Department of Transportation actively monitors prices
21 and is required to do so because of this -- being commerce with
22 this nation.

23 This also not just meets the *Southern Motor Carriers*
24 test, but it also meets the Credit Suisse four-factor test.
25 Four factors, you may recall, in Credit Suisse, which cites

1 *Gordon vs. New York Stock Exchange*, are -- the conduct at issue
2 is squarely within the heartland of what the two national
3 transport agencies regulate. It's squarely in the heartland
4 because this is in the basic treaty, and in the implementation
5 of the treaty.

6 Second, there's a clear authority by treaty and
7 national regulatory law to regulate the price of these air
8 fares. That's also present.

9 Third, as the documents we have given you here show,
10 and other documents we've submitted, there is active and
11 ongoing agency regulation. And that factor, which was missing
12 in *Tyco*, which the plaintiffs cite, is just not relevant here.

13 And fourth, there is a serious conflict between the
14 antitrust and regulatory regimes that would exist if the United
15 States was allowed to bring this international treaty
16 arrangement into your court to be challenged under the
17 antitrust laws.

18 The final point I would make, your Honor, is that if
19 you read the language our way, then the treaty preempts
20 domestic U.S. antitrust enforcement, the language they cite in
21 their brief. If you apply *Southern Motor Carriers* and *Credit*
22 *Suisse* their way, which you have to do because there can't be
23 discrimination against Japanese regulation, it still wins under
24 the proper exemption from U.S. antitrust law. And either way,
25 you should dismiss.

1 Now, I've been encouraged to address the question of
2 the plea that ANA made. And I am going to take my guidance
3 from you and leave that for --

4 THE COURT: I think I have to look at it -- exactly.
5 And then I think also the parties should be permitted to make a
6 submission as to what they feel the import of the documents to
7 be.

8 MR. ROSENTHAL: I agree. I'm only going to make this
9 point: That ANA has not pled to price fixing as to published
10 fares that are the subject of this treaty, including fuel
11 surcharges. At anytime. And the U.S. Department of Justice
12 has not alleged that ANA would have violated U.S. antitrust law
13 if it had done so.

14 Thank you.

15 THE COURT: Thank you.

16 MR. ROSENTHAL: I'd like to reserve a couple of
17 minutes.

18 THE COURT: Sure.

19 MR. LEBSOCK: Good morning, your Honor. Chris Lebsock
20 for the plaintiffs.

21 It is our position that the state action doctrine and
22 the implied preclusion doctrine of *Credit Suisse* would not
23 apply to foreign nations. It's never been held -- those
24 doctrines have never been held to apply to foreign nations.
25 And in fact, when we go back and we look at the underpinnings

1 of where state action came from, it's a doctrine that is really
2 a doctrine between the states of the United States and the
3 relationship --

4 THE COURT: There's no application of the state action
5 doctrine to any foreign corporation, is there?

6 MR. LEBSOCK: There are no cases like that. In fact,
7 the only case that's out there is a case that goes in our
8 favor. It's called *Outboard Marine vs. Postel*, and it's a
9 district court case, I think from 1978, out of the District of
10 Delaware. And there the Court refused to hold that the state
11 action doctrine -- state action doctrine applied to a foreign
12 company.

13 So our position fundamentally is when you look at the
14 underpinnings of the state action doctrine, what it's really
15 saying there is that the states have a right to regulate unless
16 the federal government speaks to the contrary. And here the
17 federal government has spoke to the contrary. The United
18 States Congress in 1979 enacted the International Air
19 Transportation Competition Act.

20 THE COURT: What about the other argument they have
21 which says, essentially, that, look, we have -- there's a
22 treaty, and the treaty has essentially impliedly overruled or
23 spoken on the issue of whether or not antitrust law should be
24 applied to the establishment of these rates. I mean, I think
25 their first argument isn't very satisfying. Their second

1 argument gives me some pause because they're saying, Look, we
2 have a -- you know, the government, the United States, entered
3 into treaties with Japan to set these prices in an
4 anticompetitive market, and now suddenly they're -- that's what
5 the treaty is, and the treaty is a law of -- that this court
6 must follow, right? And it impliedly -- it was enacted after
7 the Sherman Act was enacted, and therefore it speaks to
8 competitive markets and the question of competition in
9 particular areas, and it essentially, by implication -- it's
10 not said directly -- by implication, it permits this type of
11 arrangement. That's -- I think that's their -- I mean, that's
12 the argument that I'm listening to.

13 The other argument, it's a nice argument, but the one
14 I'm actually listening to is that one. So why don't you
15 address that?

16 MR. LEBSOCK: You don't need to pause, then, and
17 here's why.

18 THE COURT: Okay.

19 MR. LEBSOCK: Mr. Rosenthal has pointed out that there
20 are these 14 or so other air transport agreements with other
21 nations around the world, that Japan has with these other
22 nations around the world. What it doesn't say is that
23 transportation agreement and the language in them is not part
24 of the transportation agreement between the United States and
25 Japan. That transportation agreement -- and that 1998 MOU,

1 which reinvigorates it, modifies it, and that Mr. Rosenthal
2 read from, explicitly says -- and reserves the right to the
3 United States to enforce its competition laws. And you can't
4 have an implied preclusion when you have an express statement
5 that the law of the United States is reserved and can apply
6 under the circumstances.

7 THE COURT: Okay. So you take this language, both of
8 you take the language and you read it two different ways. My
9 question to you is: Should I ask the State Department how they
10 read it? They're the people who write the treaties. There's a
11 mechanism for me doing that.

12 MR. LEBSOCK: We have no objection to that, your
13 Honor. But we also would note that ANA, as of Friday,
14 announced it was going to plead guilty to price-fixing of air
15 passenger fares.

16 THE COURT: Then we ought to get a pretty quick
17 response.

18 (General laughter)

19 MR. LEBSOCK: Our position is we have no objection to
20 that, your Honor.

21 THE COURT: Thank you. Anything further on that
22 point?

23 MR. ROSENTHAL: Your Honor, the *Outboard* case is no
24 relevant precedent. It was an artifact of the Cold War and
25 involved the standing of a company which was dominated by the

1 State of Poland, and essentially a trade dispute. It has no
2 relationship to this treaty.

3 What I would respectfully urge you to consider is that
4 if this is an application of U.S. domestic law that is now
5 permitted under the treaty, then we're talking about the
6 domestic law that ought to include these two doctrines, Supreme
7 Court precedent. There's nothing that indicates that they have
8 to stop at the water's edge. And remember, the United States
9 signed this 1998 memorandum of understanding. So it's saying
10 it agrees that whatever is in U.S. domestic law should be
11 applicable to Japan. I ask you not to -- quickly dismiss it.

12 THE COURT: So if the defenses are operative, how do
13 they apply in this particular case?

14 MR. ROSENTHAL: Well, I think *Southern Motor Carriers*,
15 because of the two-step Mid-Cal test, it fits like a glove.

16 And *Credit Suisse* meets -- hits all of the four
17 criteria of *Gordon*.

18 THE COURT: *Credit Suisse* has never been implied in
19 this context, has it?

20 MR. ROSENTHAL: No. But here we have the help of the
21 United States signing a treaty saying, We have no problem with
22 it applying, and I'm happy to have you go to the State
23 Department on this issue.

24 But Mr. Lebsock I don't think heard me. What I said
25 was, ANA has not pled guilty to any violation of any

1 price-fixing of any air fares that are the subject of these
2 treaties. It has made no admission that is relevant to this
3 motion to dismiss.

4 THE COURT: My guess is after this hearing, there may
5 be some discussions as to exactly what's going to be ultimately
6 in the plea agreement, unless it's already been negotiated.

7 MR. ROSENTHAL: The plea agreement has been
8 negotiated. And I would be happy if your Honor would indulge
9 me to read to you exactly what ANA has pled to.

10 THE COURT: We'll wait on that.

11 MR. ROSENTHAL: Okay. Fine. Thank you.

12 THE COURT: Let's go to the next motion.

13 MR. HAWK: I'd like to go to Act of State, your Honor,
14 if that's where you're going.

15 THE COURT: That's fine. Sure. Yeah.

16 MR. HAWK: Good morning, your Honor. Robert Hawk from
17 Hogan, Lovells arguing on behalf of Vietnam Airlines.

18 We will -- do want to make some arguments a bit later
19 about our own individual motion to dismiss. But this, what I
20 would like to speak a few moments on now is the Act of State
21 motion to dismiss that's brought on behalf of both Vietnam
22 Airlines and Thai Airways.

23 And your Honor, the essential question posed by the
24 Act of State for this motion is should this Court sit in
25 judgment on the conduct of the sovereign nations of Vietnam and

1 Thailand with respect to their conduct in setting international
2 fares as exercised through their state-owned and-managed
3 national airlines, Thai Airways and Vietnam Airlines.

4 To answer this question, really, the logical place to
5 start is: Who are the defendants here? And the defendants in
6 this case, your Honor, are both the single national airlines of
7 these two countries. Both -- they're both state-owned.
8 They're both managed under the direct direction of the
9 government, and according to specific, detailed law in each
10 country.

11 The analogues to these airlines in the United States,
12 your Honor, if you will, would be the National Park Service,
13 the National Forestry service, the U.S. Post Office. Where the
14 United States has seen that particular otherwise commercial,
15 arguably, activity, important enough in the United States to
16 own it and to direct it. And that's what -- that's the
17 judgment that Thailand and Vietnam have made about their
18 national airlines.

19 The next question, of course, is whether the claims
20 asserted by these plaintiffs would require this court to sit in
21 judgment on sovereign conduct. And the answer to that
22 question, your Honor, is indisputably yes. Just as if it was
23 going to sit in judgment on the conduct of any other agency or
24 organ of the states of Vietnam or Thailand. Vietnamese law,
25 which we've submitted to your Honor and asked you to take

1 judicial notice of, makes that absolutely clear. Vietnamese
2 law provides that the managers and the chief of Vietnam
3 airlines are chosen by and responsible to the prime minister of
4 the country of Vietnam. The prime minister himself is
5 designated as responsible for setting airline policies and
6 practices, specifically with regard to the setting of fares,
7 international airline fares. National law even spells out the
8 particular policies that the prime minister is supposed to give
9 weight to in deciding what the fares are going to be.

10 THE COURT: Let me go back to yesterday's motion.

11 MR. HAWK: What, your Honor?

12 THE COURT: Yesterday's motion. If I granted the
13 foreign injury claims, injury, you know, outside the United
14 States, would there be anything left in your case? Would there
15 be anything left for you to defend against?

16 MR. HAWK: If I'm understanding your -- I'm not sure
17 I'm understand your question.

18 THE COURT: The allegation is that there's a foreign
19 injury. That may impact -- it may be domestic injury with
20 respect to the foreign injury, but if I granted the defendant's
21 motion with respect to the FT -- what is it?

22 MR. HAWK: FTAIA.

23 THE COURT: Is there anything left against you?

24 MR. HAWK: No, your Honor.

25 THE COURT: If I get to this issue.

1 MR. HAWK: I don't think so. I think there would be
2 nothing left, in the case of Vietnam Airlines. Because in the
3 case of Vietnam Airlines, like the European carriers, in a
4 sense, Vietnam Airlines does not operate flights into or out of
5 the United States. It might like to, but it doesn't have the
6 requisite approvals to operate those flights. So, by
7 definition, we make a separate FTAIA argument to get us out
8 entirely.

9 THE COURT: Shouldn't I get the state defendant's view
10 as to the applicable of the state doctrine?

11 MR. HAWK: I don't think it's necessary, your Honor.
12 Obviously if your Honor wants to do, that -- it's fine, and we
13 don't object to it. But I would make the point that's actually
14 made in the Sabbatino case, the *Banco National de Cuba vs.*
15 *Sabbatino*, where it was, one of the parties raised, you know,
16 shouldn't we find out what the executive branch thinks, should
17 we find out what the state department thinks? And the Supreme
18 Court said, "Often, the state department will wish to refrain
19 from taking an official position, particularly at a moment that
20 would be dictated by the development of private litigation but
21 might be inopportune diplomatically."

22 THE COURT: That's right. I can't require them to
23 state a position. It's up to them. There are these things I
24 think they could say other than just ignoring me. One is --
25 they could always do that, they can do that. But they can say,

1 We think "X"; We think "Y"; or, We don't wish to take a
2 position at this time. And they don't have to say why they
3 don't want to take a position.

4 And there's a fourth. They can come in here anyway.
5 I mean, if they know about the litigation, and I've had that on
6 other occasions, but generally it's with the United States as a
7 party. Or somehow very much interested in the litigation,
8 clearly they're following it.

9 But that's why I don't find that argument terribly
10 persuasive. I understand there may be very good reasons for
11 them not to do it.

12 MR. HAWK: But you're kind of putting them on the
13 spot, if you will, your Honor.

14 THE COURT: I'm just a district court judge. Not
15 putting them that much on the spot.

16 MR. HAWK: I guess the only point is, I don't think
17 you need to do that.

18 THE COURT: I understand that.

19 MR. HAWK: Because --

20 THE COURT: Let me hear from the other side, because I
21 want to see whether --

22 UNIDENTIFIED MAN: May I say a word on behalf of Thai
23 airways.

24 THE COURT: Thank you.

25 MR. ROLFE: Ron Rolfe for Thai Airways Public

1 International Company, Ltd. Long name.

2 Thai Airways is 51 percent owned by the government of
3 Thailand and it's board of directors. It's populated by
4 officials of the government. The only reason I raise this is
5 that Thai does have flights out of the United States. So -- to
6 Thailand. So that even if you were to grant the FTAIA
7 motion --

8 THE COURT: You'd still be in it.

9 MR. ROLFE: We would still have the Act of State
10 defense which would need to be argued.

11 THE COURT: I appreciate that. That was my question
12 to your colleague, and I see there's a difference.

13 Yes. Come forward.

14 First, a question. There's no dispute, is there, that
15 both the Vietnam and Thai Airways are sovereigns?

16 MR. LEBSOCK: We're not going to contest that for
17 purposes of the motion.

18 THE COURT: And is there any dispute as to whether the
19 acts that are complained about occurred outside the United
20 States or occurred -- basically occurred in their territories
21 as distinct from our territories?

22 MR. LEBSOCK: Well, most of the conduct that we have
23 alleged in the complaint has occurred in Asia.

24 THE COURT: Now, is there any Ninth Circuit authority
25 for the proposition that somehow the Act of State Doctrine

1 doesn't apply to commercial transactions?

2 MR. LEBSOCK: There is, your Honor.

3 THE COURT: And what is that?

4 MR. LEBSOCK: It's *Northrup vs. McDonnell Douglas*.

5 The cite is 725 F.2d 1030. The pin is 1048. And it's in
6 Footnote 25. It's a Ninth Circuit case from 1983. It follows
7 the IAM case, the *International Association of Machinists vs.*
8 *OPEC* case. And what it says specifically is that purely
9 commercial activity, ordinarily, does not require judicial
10 forbearance under the Act of State Doctrine. It leaves open
11 the possibility that in some cases, including the case that
12 was -- the IAM case or the OPEC case, where we are talking
13 about a mineral that creates dispute amongst countries, has
14 created war, and is the precious natural resource of many of
15 the states that OPEC constitutes -- in those types of very
16 unusual cases, there is no, even though there is commercial
17 activity involved, the courts have decided that in those types
18 of unusual cases it's better that they do not get involved.

19 That is not this case. This is a case involving
20 purely commercial activity, where these two defendants and
21 everyone else has reached out to the United States, has
22 obtained permission to land their planes here, and in exchange
23 for that, as is said in the Lake Airways case cited in our
24 case, they agreed to be bound by our laws. They agree, as the
25 foreign sovereigns to sue and be sued in the United States for

1 transportation, both ways, between the United States and their
2 countries. And they are operating under a regime where the
3 Congress has said that the Sherman Act shall remain fully
4 applicable -- those are their words -- to foreign air
5 transportation.

6 Congress has followed that up by enacting U.S. 49 USC,
7 Section 49308, and that section provides for immunity to the
8 extent that the airlines, including Mr. Rosenthal's clients,
9 come to the United States, apply to the Department of
10 Transportation, and receive approval to engage in
11 anticompetitive collective agreements.

12 And what none of these airlines have done, including
13 Thai Airways, including Vietnam Airways, is come to the United
14 States and get that approval for this conduct that's involved
15 in this case.

16 So we do think that this is a -- the typical type of
17 case where the commercial exception applies.

18 Now, it is controversial in some respects. There's
19 been discussion in the case about whether there is a commercial
20 activity exception to the Act of State Doctrine that's
21 analogous to what's in the Foreign Sovereign Immunities Act.
22 Even if it is true that there is, standing alone, a pure
23 commercial activity exception -- and we think *Northrup* stands
24 for that proposition -- there is no official action here. And
25 what we're talking about is a governmental decree, a

1 legislative decree, or a formal order of repudiation. And what
2 we know is that the evidence that's been submitted by these
3 defendants does not say that the states of Thailand and Vietnam
4 approve of price-fixing. That's not at all what they're
5 saying, and there has been no official approval or decree
6 endorsing that.

7 They also do not repudiate, officially -- or
8 unofficially, even -- their bilateral air transport agreements
9 with the United States. And those agreements that were agreed
10 upon between the governments of the United States and Thailand
11 and Vietnam say, in Section 12 on pricing, that pricing shall
12 be governed by commercial considerations in the marketplace.
13 It is not governed by state decrees about what the price should
14 be or orders of price-fixing or anything like that.

15 So at bottom, there is no Act of State concern here.
16 Okay.

17 THE COURT: Okay, thank you.

18 MR. HAWK: Just to respond to the points made: First
19 of all, with regard to the commercial and -- so-called
20 commercial exception, in the context of foreign sovereign
21 immunities, it's one thing. It exists by virtue of the statute
22 itself.

23 With regard to the Act of State doctrine, the Supreme
24 Court has spoken on it once, and when the Supreme Court spoke
25 on it, five justices declined to accept it. Four justices did.

1 Five declined not to accept a commercial exception.

2 In the *IAM* case in the Ninth Circuit, the Ninth
3 Circuit was explicit: There is no commercial exception for Act
4 of State doctrine in the Ninth Circuit.

5 The *Northrup* case does not remotely reverse what *IAM*
6 had to say, your Honor. It does not apply a commercial
7 exception as the basis of a ruling in that case. The -- with
8 regard to the notion the plaintiff's counsel brings up aboutu
9 Vietnam or Thailand agreeing to be bound by U.S. law, that is
10 all in the context of foreign sovereign immunity or other
11 specific statutory wavers. That is not what the Act of State
12 doctrine is about. That is a straw man argument. It has
13 nothing to do with what we're arguing.

14 With regard to counsel's argument that, Well, Vietnam
15 and Thailand, they haven't really adopted price-fixing as a
16 national policy, so you're not really sitting in conduct on
17 that -- sitting in judgment on that kind of conduct, that
18 ignores reality, your Honor. Under Vietnamese law, there are
19 four -- there are three directives on what the prime minister
20 and the civil aviation department are supposed to consider in
21 setting prices:

22 One is the development of Vietnam's air service, which
23 is just getting off the ground, so to speak, your Honor, it's
24 not -- and it hasn't been around for that many years.

25 Second of all, consistency with a social and economic

1 policies of the communist party and the state.

2 Third, discharge of obligations with regard to the
3 State budget. What's not there is compliance with the U.S.
4 Sherman Act. Your Honor, if you would continue to have Vietnam
5 and Thailand in this case, you would necessarily be sitting in
6 judgment on the conduct of sovereigns. And for that reason
7 alone, regardless of what the State Department might say or not
8 say, these two defendants should be dismissed.

9 With regard to the ATA agreements, which was the last
10 point brought up by counsel, a separate argument on that, I'd
11 like to defer to when we argue about that, if that's okay.

12 THE COURT: Okay. Thank you.

13 MR. SHERMAN: With respect to the next two motions on
14 our list, the relation back motion and the fraudulent
15 concealment motion, I believe that the parties have made those
16 motions, are prepared to submit on the papers, unless you have
17 specific questions.

18 THE COURT: I don't. Submitted.

19 MR. SHERMAN: And similarly, on the individual motions
20 to dismiss, as Mr. Hawk mentioned, he may have a few comments.
21 I don't know if any other counsel have particular points.

22 THE COURT: I mean, many of the issues have already
23 been addressed. So there's no reason to.

24 MR. SHERMAN: As we said in the beginning yesterday,
25 we don't intend to have anybody go over, but counsel certainly

1 want to go over any questions you might have.

2 THE COURT: I don't have any questions.

3 MR. SHERMAN: If I may turn it back over to Mr. Hawk
4 for the brief comments that he wanted to make.

5 MR. HAWK: Your Honor, two points really to make
6 individually on behalf of Vietnam Airlines, additional points:

7 One would be the argument that we made with regard to
8 the ATA, the treaty, the executive agreement. And there, all
9 Vietnam Airlines is asking this Court is to have its agreement
10 with the United States enforced according to its plain terms.
11 There are three bits of protocol language in that air transport
12 agreement. The first is that each party should allow prices
13 for air transportation to be established by the designated
14 airlines based upon commercial considerations in the
15 marketplace. It's mandatory language. It says: This is how
16 we're going to treat pricing, as an agreement between these two
17 countries.

18 It also contemplates intervention, that one side or
19 the other's going to have some problems with a price
20 established by one of the national -- by one of the designated
21 airlines. In that event, intervention by the United States
22 government or the Vietnamese government is limited to three
23 specific situations:

24 One of those three circumstances is the protection of
25 consumers from unreasonably high prices or prices due to abuse

1 of a dominant position. So there is some contemplation that
2 there might be an issue, an antitrust issue, a price-fixing
3 issue, perhaps, but with regard to such unilateral
4 intervention, it is specifically limited to what the treaty,
5 what the executive agreement says. That is the only way that
6 we're going to permit unilateral intervention by either side is
7 through diplomatic consultations. And if those diplomatic
8 consultations don't work, what the agreement says is that the
9 price shall go into effect or remain in effect.

10 And so if you just read the -- I mean, if this was a
11 contract between two parties in a contract case, there would
12 really be no issue. The plain language of this agreement is
13 absolutely irreconcilable with plaintiff's claims here, because
14 plaintiff's claims want to have you as the judiciary, one of
15 the three branches of the U.S. government under the
16 Constitution, to tell the government of Vietnam that, No, I
17 don't care what the treaty says, I have some parties before me
18 that are complaining about these prices and so I'm going to
19 enter judgment against you, Vietnam Airlines.

20 That is absolutely irreconcilable with this executive
21 agreement, your Honor. The only argument they have is that the
22 Court is not the same thing, we really have private parties,
23 the Court is not part of the United States government. That's
24 just not right, your Honor, under the -- it's a basic
25 constitutional precept, of course. And we cite authorities

1 from international law and other authorities.

2 THE COURT: Am I bound to follow the treaty?

3 MR. HAWK: You are.

4 THE COURT: Supreme law of the land, isn't it? Like
5 the Constitution? And when I looked at it last -- I have a
6 copy of the constitution.

7 MR. HAWK: It was passed after this treaty was entered
8 into, long after the Sherman Act, your Honor, and so by that
9 token trumps the Sherman Act, if you will.

10 THE COURT: Okay. Thank you.

11 MR. HAWK: The only other thing that I wanted to
12 mention, your Honor -- and I can do it while I'm standing up
13 here.

14 THE COURT: Okay.

15 MR. HAWK: Is *Twombly*.

16 THE COURT: Pardon me?

17 MR. HAWK: The only other --

18 THE COURT: Is what?

19 MR. HAWK: *Twombly*. I just wanted to point out, our
20 particular circumstance --

21 THE COURT: I don't want to hear about *Twombly*. I've
22 heard enough about *Twombly* already.

23 MR. HAWK: How we're different, your Honor.

24 THE COURT: If you want to make an argument --

25 MR. HAWK: I appreciate it, your Honor. Vietnam

1 Airlines is different, all right, in very important ways.
2 Number 1, there is no parallel conduct alleged against Vietnam
3 Airlines. You've had plaintiffs stand up here and tell you
4 that, Well, if we have parallel conduct and we have a little
5 sprinkling of something else, we have enough, we have enough
6 for a plausible claim. With regard to Vietnam Airlines, there
7 is no parallel conduct. There are no fares, no lockstep fares
8 alleged. And the only table -- the only thing they point to is
9 this table of surcharges where it shows -- and I've forgotten
10 what paragraph it is; I bet plaintiffs will remind me, in the
11 complaint -- but those are all surcharges out of Hong Kong.
12 And the critical point, your Honor, is that out of Hong Kong,
13 Vietnam Airlines does not fly to the United States. They don't
14 fly to the United States in any event, but they also don't --
15 there's no code share out of Hong Kong into the United States.
16 There is no parallel conduct.

17 Second of all, your Honor, the talk about pleas, plea
18 agreements and criminal investigations. Attached to their
19 complaint is a table that sets out who that covers, and in
20 fact, they affirmatively allege that Vietnam Airlines is not
21 implicated in any of that, your Honor.

22 So, because Vietnam Airlines doesn't fly to the United
23 States or from the United States, and because of these other
24 issues, we think we're -- there's not a plausible claim against
25 Vietnam Airlines.

1 MR. WILLIAMS: Your Honor, Steve Williams for the
2 plaintiffs.

3 I want to briefly respond on the air transport
4 agreement argument. I believe Mr. Lehmann will briefly respond
5 on that small *Twombly* argument.

6 In terms of the air transport agreement, as with most
7 or many of the arguments that you've heard from defendants in
8 these two days, there's no cases that support what they're
9 asking you to do. And the closest cases that there are go
10 against them. And the closest cases that you're going to find
11 is the *Laker* case, which looked at the same type of treaty and
12 with the same type of arguments, and said, "As to the parties
13 there, you're not immune from the domestic antitrust laws of
14 the United States; you're subject to them."

15 In the *Airline Pilots* case, which again involved an
16 argument that the air transport agreements just like these ones
17 at issue here, precluded labor laws, the Court said no.

18 In a case Vietnam didn't cite, but Philippine and Thai
19 cited -- I don't know if they're going to get a chance to
20 argue -- called *Leminster*, they both cited this case in their
21 reply brief and they say the ATA's preempt U.S. labor laws.
22 Cited a case by Judge Jenson. They didn't tell your Honor that
23 the Ninth Circuit reversed that and said, No, that's not true,
24 their transport agreements don't preempt U.S. labor laws.

25 So they don't preempt labor laws, they don't preempt

1 Title VII discrimination laws, and they don't preempt
2 competition laws. That's what the courts who have looked at
3 this have said. And what Congress has said is that the
4 antitrust laws are fully applicable to air transportation.

5 What the Supreme Court says is that prices are to be
6 set by competition, as Congress has said, and limitations from
7 that, exceptions from that, are to be narrowly construed.

8 What the Braniff case that we cited to you says is
9 grants of immunity are extremely rare, and antitrust exposure
10 is a normal risk of doing business in an unregulated
11 competitive environment, consistent with everything that we've
12 been telling you that DOT and Congress has said when they
13 passed these laws. They've not given you a basis to conclude
14 that the conduct at issue here is preempted. And they say,
15 Well, your Honor, if you act, if this court acts, then you're
16 violating this agreement.

17 The cases they've cited to don't say that. They cite
18 a case where the Russian federation is sued and judgment is
19 held against it, and then the Russian government comes and
20 says, That's not us. And the case says, in that context,
21 you're the same thing. To say that private parties suing to
22 vindicate their rights under the Sherman Act in this court are
23 the same thing --

24 THE COURT: Focusing more -- I'm going back and
25 thinking about your argument about the labor laws as an

1 example. And let's say Vietnam or Vietnamese Airlines has a
2 policy that would clearly violate the labor laws of the United
3 States. They employ underage people or they work 22 hours or
4 something. I mean, some violation of labor law. Are you
5 saying that -- and it's set by a sovereign. That is to say,
6 it's owned by the country, so the country sets those
7 regulations and so forth. Are you saying that somehow that's
8 actionable in the United States?

9 MR. WILLIAMS: In Airline Pilots 748 F.2d at Page 969,
10 the Fifth Circuit -- I think that's the exact issue they looked
11 at. And they said, "We are not persuaded that parties to the
12 air transportation agreement intended that a dispute between
13 private parties was to be arbitrable under the agreements
14 provisions that involve labor laws."

15 And the case, the Judge Jensen case, the Leminster
16 case, that was a discrimination case where they said, We can
17 just use our own people. And they said, No, you have to comply
18 with U.S. laws.

19 They're asking you to go further than the cases permit
20 you.

21 THE COURT: Let me find out how counsel distinguishes
22 that.

23 MR. WILLIAMS: Thank you.

24 THE COURT: I don't want to hear about *Twombly*
25 anymore.

1 MR. HAWK: Noted, your Honor.

2 Just with respect to the case citations that
3 plaintiff's counsel referred to, the *Laker* case, if the Court
4 can divine any principal out of the *Laker* case, it's doing a
5 lot better than I have been able to do. It is a case in a very
6 complicated procedural situation that really does not bear
7 on -- it makes some comments about the -- makes some comments
8 about the Act of State doctrine; makes some comments about
9 ATA's, but there's nothing in that case inconsistent with the
10 proposition that we have put before your Honor, which is:

11 If you look at the plain language of what is in this
12 treaty and then you look at what these plaintiffs, what their
13 claims are and what they are focused on, that's enough. I
14 mean, these other cases -- the same thing with *Liminster*, ATA's
15 don't preclude labor laws. Some court found that and looked at
16 the provisions and came to that conclusion, but that's not
17 what's before this court.

18 MR. ROLFE: I have one thing, if I might. And that is
19 with respect to the airline transport case -- Ron Rolfe for
20 Thai Airways, forgive me.

21 With respect to the Airline Pilots Association case,
22 the Court found that there was an explicit subjugation of the
23 ATA, there was an express exemption of the ATA for the Railway
24 Labor Act and other domestic employment statutes. And what the
25 Court says is, quote, "The express language of the ATA and

1 airline pilots reflects that the parties did not intend the
2 agreement to replace relevant domestic labor law."

3 Here what you have is a comprehensive scheme, as
4 Mr. Hawk says, in Thailand for regulation, for consultation
5 between the governments, and pricing. The Vietnam statute is
6 almost identical to the Thai statute.

7 THE COURT: Thank you.

8 MR. WILLIAMS: If I may, very briefly, I'm reminded on
9 the issue of ATA that we're all talking about right now, the
10 decision that we submitted to this Court after briefing was
11 done, that came out of the Eastern District of Brooklyn in the
12 *Air Cargo* case that Magistrate Judge Poresky issued, Judge
13 Gleeson yesterday affirmed, considered this issue, and it
14 addresses the same arguments that this Court is addressing.
15 We'd like the Court to note that.

16 MR. SHERMAN: Your Honor, I just want to check and
17 make sure whether there are any other defendants who want to
18 speak. I don't see anyone.

19 That concludes our arguments on the motion. As you
20 know, we've submitted a case management conference with
21 plaintiffs.

22 THE COURT: What I'm going to do -- don't you think
23 it's better for me to -- before you do anything, other than I'd
24 like a submission on the pleas of --

25 MR. COTCHETT: On the DOJ.

1 THE COURT: I'd like that. I don't know to what
2 extent, and I think I have to go through things, that I want
3 inquiries or I'm going to suggest that inquiries be made to the
4 State Department or the Department of Transportation. I mean,
5 that's a -- you know, that causes a certain amount of
6 inconvenience to all sorts of people. And maybe it's warranted
7 and maybe it isn't. And it may depend on how I answer other
8 things.

9 And so I want to go through some analysis, and then
10 I'll write something, and then we'll all get together again to
11 discuss what I've written.

12 MR. SHERMAN: We agree completely, your Honor. Thank
13 you.

14 THE COURT: Nobody wants to go in and start taking
15 more depositions.

16 MR. COTCHETT: No. That makes sense, your Honor.

17 THE COURT: All right. Well, obviously, it's been
18 very interesting.

19 MR. LEBSOCK: Just one other thing, though: I think
20 we did have an agreement that 15 days after the motion to stay
21 was denied, that we would do some initial, you know, initial
22 disclosures and that sort of thing. And I think from the
23 plaintiff's perspective we are prepared to go forward with
24 that, if there's no objection from Mr. Sherman. At least that
25 limited stuff should happen.

1 MR. SHERMAN: With the Court's guidance.

2 THE COURT: Well, you know, I always take the position
3 that these -- the Rule 26 disclosures and so forth? -- that
4 it's a good idea to do that.

5 MR. SHERMAN: All right, your Honor. We did say we'd
6 do those.

7 THE COURT: Then I think you should honor that, and I
8 think that's important. But it won't -- obviously doesn't
9 impact anything that I have before me. At least, I don't think
10 so.

11 MR. SHERMAN: Thank you, your Honor.

12 THE COURT: Thank you very much for coming.

13 MR. COTCHETT: Thank you, your Honor.

14 MR. SHERMAN: Thank you. Thank you.

15 MR. LEHMANN: Thank you.

16 MR. LEBSOCK: Thank you.

17 MR. WILLIAMS: Thank you.

18 (Adjourned)

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CERTIFICATE OF REPORTER

I, Connie Kuhl, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into written form.



Connie Kuhl, RMR, CRR
Monday, November 22, 2010